Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
1996 Term

SHARON L. WRIGHT

Petitioner

v.

PAMELA CARTER, Individually and In Her Official Capacity as Attorney General of the State of Indiana; DAVID F. HAMILTON, JANICE E. KREUSCHER, DENNIS P. LEE and MATTHEW R. GUTWEIN, Individually and Personally Liable

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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31 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether in discharging Wright, the elected Attorney General of the State of Indiana is absolutely immune from liability and exempt from the federal constitutional prohibition against politically motivated discharge of government employees, even though Indiana State law provides that the Attorney General and attorneys employed in the Office of Attorney General as defense counsel are politically independent.

2. Whether all attorneys whatsoever employed in the Office of Attorney General of the State of Indiana are exempt from the definition of "employee" under the federal Age Discrimination in Employment Act, thereby permitting the Indiana Attorney General to engage in age discrimination in the employment of attorneys.

PARTIES TO THE ORIGINAL PROCEEDINGS

A. Petitioner-Original Plaintiff (Appellant in Seventh Circuit):

SHARON L. WRIGHT

B. Respondents-Original Defendants (Appellees in Seventh Circuit):

PAMELA CARTER, Individually and in her Official Capacity as Attorney General of the State of Indiana; DAVID F. HAMILTON, JANICE E. KREUSCHER, DENNIS P. LEE, and MATTHEW R. GUTWEIN, Individually and Personally Liable.

C. References:

Hereinafter the Petitioner shall be referred to as "Wright" and the Respondents shall be referred to as "Carter" and/or "Attorney General" of the State of Indiana.

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TABLE OF AUTHORITIES

Cases:

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
1996 Term

SHARON L. WRIGHT

Petitioner

v.

PAMELA CARTER, Individually and In Her Official Capacity as ATTORNEY GENERAL OF THE STATE OF INDIANA; DAVID F. HAMILTON, JANICE E. KREUSCHER, DENNIS P. LEE and MATTHEW R. GUTWEIN, Individually and Personally Liable

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OPINIONS BY OTHER COURTS

Wright v. Carter, unpublished (Seventh Circuit, August 9, 1996)(A-1 to A-3)

Wright v. Carter, et al., unpublished (U.S. District Court, Southern District of Indiana, May 11, 1995, Amended Entry of Judgment May 30, 1995) (A-4 to A-6)

Americanos v. Carter, et al., unpublished (U.S. District Court, Southern District of Indiana, December 13, 1994), incorporated by reference into U.S. District Court's opinion and referred to in *Seventh Circuit's opinion in Wright v. Carter* (A-7 to A-13)

In its unpublished opinion herein, the Seventh Circuit also relied upon *Americanos v. Carter*, 74 F.3d 138 (7th Cir. 1996), *cert. denied*, containing the reasons for affirming the U.S. District Court's order dismissing Wright's lawsuit.

JURISDICTIONAL STATEMENT

Wright seeks review of the decision of the United States Court of Appeals for the Seventh Circuit dated August 9, 1996, whereby it affirmed the decision of the United States District Court for the Southern District of Indiana in which the District Court had dismissed Wright's action for failure to state a claim.

Jurisdiction of the federal courts is invoked pursuant to the provisions of 28 U.S.C. 1331 and 1343 to hear Wright's claims under the United States Constitution and laws, and brought pursuant to 29 U.S.C. 621 et seq.,42 U.S.C. 1983, and the First and Fourteenth Amendments to the Constitution of the United States.

The Order by the District Court dismissing Wright's action on the merits contained sufficient language as to "finality" to provide Wright an appeal as a matter of right pursuant to 28 U.S.C. 1291.

With the August 9, 1996 decision by the Court of appeals affirming the summary judgment ruling, Wright files her petition for writ of certiorari and the jurisdiction

of the United States Supreme Court is invoked pursuant to 28 U.S.C. 1254.

APPLICABLE STATUTORY PROVISIONS

A. **29 U.S.C. 623. Prohibition of age discrimination.**

It shall be unlawful for an employer --

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . .

29 U.S.C. 630(f) Definitions.

For the purposes of this chapter -- * * *

> (f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. . . .

B. **42 U.S.C. 1983. Civil action for deprivation of rights.**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen fo the United State or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

C. **Constitution of the United States: Amendment I.**

Freedom of religion, speech and press; peaceful assemblage; petition of grievances.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

D. **Constitution of the United States: Amendment XIV.**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens ofthe United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. ***

E. **Fed. R. Civ. P. 12**. Defenses and Objections -- When and How Presented -- By Pleading or Motion -- Motion for Judgment on Pleadings.

* * *

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted * * *

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. * * *

STATEMENT OF THE CASE

Wright's federal claims were dismissed on motion of Carter for failure to state a claim under Fed. R. Civ. P. 12(b)(6). On such a motion all allegations of Wright's complaint must be deemed true.

Wright was formerly employed in the Indiana

Office of Attorney General as a defense attorney in the Federal Litigation Section. Wright alleges her discharge from State employment by newly-elected Attorney General Pamela Carter (Democrat) was politically motivated, was age discrimination, and was coupled with conflicts of interest and with false and defamatory statements to the media, stigmatizing Wright in her profession as an attorney, in violation of the Age Discrimination in Employment Act and her First and Fourteenth Amendment civil rights.

Wright is politically independent. She was hired on her resume in 1992, at age 49, during the administration of a Republican, to act as defense counsel in lawsuits against the State and/or its public officials and employees. Wright had no supervisory or other policymaking power or duties. She simply defended lawsuits.

During the 1992 political campaign, Democrat Pamela Carter promised that if elected Indiana Attorney General she would replace currently-employed attorneys with bright, young people just out of law school. Politically-motivated discharges rapidly followed Carter's election. The majority of attorneys discharged as of Wright's termination were over the age of 40. Wright was at that time 50 years old, although recently hired.

As Attorney General, Carter came into office with multiple conflicts of interest. Wright was handling the defense of multiple cases pending in federal court as to which incoming supervisor Janice E. Kreuscher had a conflict of interest. It not being expected that Wright would willingly resolve those conflicts against defendants represented by her to the benefit of Carter's political backers, Wright was fired.

During her campaign and subsequently, Pamela Carter informed the media that attorneys being discharged by her had "poor work product". She stated on night news that you cannot hire "good" lawyers at $25,000 a year -- the salary which was paid to Wright.

By Entry of Judgment dated May 30, 1995, the District Court dismissed Wright's federal claims for failure to state a claim upon which relief can be granted, and declined to exercise jurisdiction over Wright's State law claims. The Seventh Circuit affirmed the district court's order dismissing Wright's action.

Thus the Indiana Attorney General has been allowed absolute immunity to engage in conflicts of interest, age discrimination and politically-motivated discharges from State employment. Vesting such unbridled political power in the Attorney General undermines the power of the Indiana State Supreme Court, which has already upheld the purpose of the Indiana Legislature when creating the Office of Attorney General as being to provide independent legal representation to the State and to its officials and employees sued within the scope of their employment for injury to others.

Wright's position as defense counsel in the Federal Litigation Section required that she be politically independent in carrying out her duties of office. Since Wright's position as defense counsel was not a political position, Wright was not exempt from the protections of the United States Constitution and the Age Discrimination in Employment Act. Therefore Carter and the other defendants should be held liable, and decisions of the lower courts should be reversed.

ARGUMENT

1. The elected Attorney General of the State of Indiana is not exempt from the federal constitutional prohibition against politically motivated discharge of government employees, because Indiana State law provides that attorneys employed in the Office of Attorney General as defense counsel are politically independent.

The decision of the United States Court of Appeals affirming dismissal of Wright's federal claims has decided a federal question in conflict with the Indiana statutes creating the Office of Attorney General and decisions of the Indiana Supreme Court.

Indiana statutory provisions regarding the Office of Attorney General are found at Ind.Code 4-6-1-2. Article 6 consists of eleven chapters. Chapter 5 contains special provisions regarding the appointment and assignment of deputies to State agencies to carry out the duties of the Attorney General, Ind.Code 4-6-5-1. This section does not pertain to defense counsel hired in the Federal Litigation Section, and is therefore misapplied by the lower courts.

In State ex rel. Sendak v. Marion County Superior Court, 373 N.E.2d 145, 149 (Ind. 1978), the Indiana Supreme Court was presented the issue whether the Indiana Legislature had unconstitutionally usurped the Governor's power to set policy for the State of Indiana by withdrawing his power to select the State's lawyers. The Indiana Supreme Court rejected the very argument relied upon herein by the United States District Court, stating as follows:

In defending a lawsuit the Attorney General is

not dictating policy or directing the State, but is merely defending the State.

Further, in Indiana State Toll Bridge Comm. v. Minor, 139 N.E.2d 445, 448 (Ind. 1957), the Indiana Supreme Court references the Indiana Attorney General's "duty to give independent legal advice", in order to furnish some protection to the individual citizen against political results in a controversy with the State or its agencies.

Thus, the duty imposed upon the Attorney General and all deputy attorneys to provide independent legal representation overrides any personal loyalty to a political party or group. The Indiana Rules of Professional Conduct, Rule 1.2, expressly provides that representation of a client (even a governmental client) does not constitute an endorsement of the client's political views. As Attorney General, Carter is not empowered to assure that all lawyers in her Office give legal advice and representation which is politically correct from her viewpoint, because she is by law *herself* required to provide *independent* representation and advice to the State and its agencies, officials and employees.

To reach an opposite conclusion, the District Court and the Seventh Circuit Court of Appeals ignore Indiana law as well as the longstanding decisions of the United States Supreme Court prohibiting political firings: Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 547 (1980); Rutan v. Republican Party of Illinois, 110 S.Ct. 2729, 2737 (1990).

Subsequent to Burns v. Reed, 111 S.Ct. 1934, 500 U.S. 478, 114 L.Ed.2d 547 (1991), aff'd in part, rev'd in part, and remanded (Indiana prosecutor entitled to only

qualified immunity for giving legal advice to police), a government lawyer cannot be required to fashion his legal advice so as to implement the political goals of the Attorney General in power without regard to violation of clearly-established Constitutional rights of citizens affected, on danger of losing his job.

Carter and her chosen staff have been permitted to cure their conflicts of interests and resolve pending cases to the benefit of their political backers by firing defense lawyers and replacing them with young, inexperienced lawyers less likely to perceive the implications of their conduct. In the process Carter wrongfully stigmatized those fired by false reports to the media that these persons had poor work product and were not good lawyers, without any meaningful redress to those harmed. Wright should be allowed redress for the harm.

In conclusion, the United States Court of Appeals for the Seventh Circuit has erroneously decided that all attorneys employed in the Office of the Indiana Attorney General are exempt from the prohibition against politically-motivated discharges, in conflict with decisions of the Indiana Supreme Court, and in conflict with applicable decisions of this Court.

2. Wright is not exempt from the definition of "employee" in the ADEA, and Attorney General Pamela Carter engaged in unlawful age discrimination in the employment of attorneys by discharging Wright.

It is unlawful for an employer to discriminate against an employee or potential employee between the ages of 40 and 70 on the basis of age. 29 U.S.C. § 621, et seq. During her campaign and after, Carter stated that she intended to replace older attorneys with young people.

After her election, Carter demanded resignations and discharged numerous lawyers, the majority of whom were over the age of forty, replacing them with a group of younger attorneys. Plaintiff was 50 years old when fired.

Plaintiff has stated a prima facie case of age discrimination under the ADEA. Nevertheless, the District Court and Seventh Circuit Court of Appeals permit such age discrimination in the Office of Attorney General under the guise that all deputy attorneys fall within the exemptions contained in the definition of "employee" at 29 U.S.C. § 630(f) as follows:

> (f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office....

In their written opinions, the District Court and the Court of Appeals for the Seventh Circuit assume facts not pleaded nor in evidence. Wright was not elected, nor chosen by Attorney General Pamela Carter to be on her personal staff, nor an appointee on the policymaking level, nor an immediate advisor with respect to the exercise of the powers of the office. Nonetheless she was chosen for discharge as part of the group of attorneys over the age of forty who were denied continued employment by the State.

Obviously, youth is not a proper requisite for the position of deputy attorney general. The fact that Pamela Carter campaigned on the issue of hiring youth to replace age does not justify her conduct in violation of federal statutory law, the policies sanctioned by the United States electorate overriding those of any supposed, but denied, local mandate that the Attorney General engage in age, race, or other discrimination in employment practices.

Respectfully submitted,

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Attorney for Petitioner
Sharon L. Wright

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

In the
United States Court of Appeals
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Argued November 30, 1995
Decided August 9, 1996

Before
Honorable WILLIAM J. BAUER, *Circuit Judge*
Honorable ILANA DIAMOND ROVNER, *Circuit Judge*
Honorable TERENCE T. EVANS, *Circuit Judge*

No. 95-2573

SHARON L. WRIGHT,	)
	) Appeal from the
Plaintiff-Appellant,	) United States
	) District Court
vs.	) for the Southern
	) District of
PAMELA CARTER, individually	) Indiana
and in her official capacity as	)
Attorney General of Indiana, et al.	) 94 C 1312
	)
Defendantts-Appellees.	) Larry J.
	) McKinney,
	) *Judge*

ORDER

Sharon L. Wright's brief tenure as a Deputy Attorney General for the State of Indiana came to an end early in 1993 following the election of a Democrat, Pamela Carter, as Attorney General. Wright contends that her termination was the result of Carter's desire to bring younger, Democratic attorneys onto the Attorney General's staff. (Wright had been hired by Carter's Republican predecessor and was fifty years old at the time of her discharge.) She filed suit pursuant to 42 U.S.C. § 1983 and the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, contending that she had been unlawfully discharged on the basis of her perceived political affiliation and her age. In a brief order incorporating its prior order in *Americanos v. Carter*, No. 94 C 0040 (S.D. Ind. Dec. 13, 1994), the district court dismissed Wright's suit pursuant to Fed. R. Civ. P. 12(b)(6), concluding that the duties and powers associated with the position of Deputy Assistant Attorney general rendered that position exempt from the constitutional prohibition of politically motivated discharge and exempt from the provisions of the ADEA.

On appeal, Wright presents two issues: (1) whether the district court was correct in concluding, as a matter of law, that all attorneys employed by the Indiana Attorney General as deputy attorneys general are exempt from the federal constitutional prohibition against politically motivated discharge; and (2) whether the district court was correct in concluding, as a matter of law, that no attorney emloyed by the Indiana Attorney General as a deputy attorney general qualified as an "employee" within the scope of the ADEA, 29 U.S.C. § 630(f). We recently answered both of these questions in the affirmative in *Americanos v. Carter*, 74 F.3d 138 (7th Cir.), *cert. denied*, 116 S.Ct. 1853 (1996), in which we

sustained the order of dismissal that the district court relied on here.

For the reasons stated in our opinion in *Americanos*, the judgment of the district court is therefore AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SHARON L. WRIGHT,	)
	)
Plaintiff,	) CAUSE NO.
	) IP94-1312-C-
	) M/S
V.	)
	)
PAMELA CARTER, Individually and in her official capacity as Attorney General of the State of Indiana, DAVID F.HAMILTON, JANICE E. KREUSCHER, DENNIS P. LEE, and MATTHEW R.GUTWEIN, individually and personally liable,	)
	)
Defendants.	)

ORDER

This cause now pends before the Court on defendants' motion to dismiss. Plaintiff Sharon L. Wright ("Wright") was appointed to the position of Deputy Attorney General by Republican Attorney General Linley E. Pearson. In 1992, defendant Pamela Carter was elected Attorney General on the Democrat ticket and subsequently discharged Wright. Wright alleges two federal claims against the defendants, a political firing claim under 42 U.S.C. § 1983, and an age discrimination claim under the Age Discrimination in Employment Act.

The Court has recently dealt with a case involving identical claims, entitled Peter C. Americanos v. Pamela Carter, Cause Number IP 94-0040-C. The Court in its decision outlined the reasons why these claims are not sustainable by holders of the office of Deputy Attorney General in the State of Indiana. The Court now **GRANTS** defendants' motion to dismiss in this case for all the reasons outlined in IP 94-0040-C, which is attached herto and made a part hereof.

There remain in this case several state law claims. Pursuant to 28 U.S.C. § 1367(c)(3), the Court declines to exercise jurisdiction over these state law claims, the federal claims having been resolved.

DATED this 11 day of May, 1995.

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PETER C. AMERICANOS,	)	
	)	
Plaintiff,	)	
v.	)	CAUSE NO.
	)	IP 94-0040 C
PAMELA CARTER, in her personal capacity and in her official capacity as the Attorney General of Indiana; DENNIS P. LEE, in his personal capacity and in his official capacity as Chief of Staff of the Attorney General of Indiana; DAVID HAMILTON, in his personal capacity, and THE STATE OF INDIANA,	)	
	)	
Defendants.	)	

ORDER ON DEFENDANTS' MOTION TO DISMISS

Plaintiff Peter Americanos ("Americanos") was appointed to the position of deputy attorney general by Republican Attorney General Theodore Sendak in the early seventies. Americanos is a Republican. Sendak was succeeded by a two-term Repblican. Americanos was reappointed both times. In 1992, Defendant Pamela Carter ("Carter") was elected Attorney General on the Democrat ticket and Americanos lost his job.

The complaint has three counts. Americanos alleges in Count 1, brought under 42 U.S.C. § 1983, that

Carter and members of her staff conspired to fire him because of his affiliation with the Republican party. He alleges that he was told that his resignation was requested "after it was determined that [his] contribution to the operations of the office [did] not fit the expectations of the current Attorney General." Americanos submitted his resignation "under protest." He alleges that the explanation he received for the demand of his resignation was a pretext and that he was constructively fired for being a Republican. He further alleges race, gender, national origin and age discrimination in Counts 2 and 3.

Defendants deny any unlawful motive in the request for Plaintiff's resignation. For the purposes of this motion to dismiss, however, Defendants assert that Plaintiff's position as deputy attorney general is exempt from the constitutional prohibition against dismissal based on political affiliation and that Plaintiff's position is not covered by Title VII or the ADEA. The Court for purposes of this entry assumes that Plaintiff's allegation that he wsa fired for his political affiliation is true.

The parties agree that the crucial question that must be answered for the resolution of Count 1 is hwether Plaintiff held a position of a confidential or policymaking nature. The case of Tomczak v. City of Chicago, 765 F.2d 633, 641 (7th Cir.), cert. denied, 474 U.S. 946 (1985), focuses this Court's inquiry on the functions of the office involved rather than the actual functioning of the officeholder. This approach makes sense else an employee holding a position of a confidential policymaking nature and performing in an inefficient or insubordinate fashion could by his or her very inadequacy become a merit employee.

The function of the office of attorney general and the deputies appointed by the attorney general is strictly statutory. The attorney general and her deputies can perform no function for the state other than those specifically delineated by statute. I.C. § 4-6-1-6. The function of the depouty attorney general is essentially the same as the attorney general. The attorney general is authorized to appoint deputies "as he may deem necessary to promptly and efficiently perform the duties of his office . . ." I.C. § 4-6-1-4. Further, the attorney general is authorized "to assign any deputy so appointed to any agency of the state of Indiana to perform in behalf of such agency and the state any and all of the rights, powers or duties now or hereafter conferred by law or laws upon the attorney general . . ." I.C. § 4-6-5-1.

The duties of the attorney general are specifically listed in the statutes. These duties include prosecuting and defending suits by or against the state and state officers, defending suits against state governmental officials or employees or teachers, advising state officials through opinions, advising state agencies, collecting outstanding debts owed to the state, and filing various reports. All these duties are delegable to the deputies.

An attorney-client relationship exists between the deputy attorney general and the state client he or she represents. That confidential relationship between lawyer and client of necessity puts the lawyer involved in a policymaking situation. When clients ask for legal advise, and, as is often the case, the law admits of more than one interpretation, the reply given will influence state policy. Thus, the position of deputy attorney general is involved directly by statute and indirectly considering the attorney-client privilege with "meaningful input into governmental

decisionmaking on issues where there is room for principled disagremeent on goals or their implementation." See Tomczak, 765 F.2d at 641; Selch v. Letts, 5 F.3d 1040, 1043 (7th Cir. 1993), cert. denied, 114 S.Ct. 1189 (1994). Furthermore, because it is impossible to monitor all the activities of the deputies, an opposition party loyalist in the position of deputy attorney general could reasonably serve to threaten the policy objectives of the attorney general. See Selch, 5 F.3d at 1044.

True, individual deputy attorneys general may not make policy in the sens of meeting with the boss regularly to map political or personnel strategy. But the depouty attorney general performing his or her attorney function is of necessity involved in governmental decisionmaking. Whether the depouty is representing a state board at a meeting of the board, or adivsing that board in writing on an issue of procedure or substance, or advising a state official on a legal issue in an official or unofficial opinion, or representing the interests of the state in a lawsuit either as plaintiff or defendant, a deputy attorney general is vested with the same authority as the attorney general herself. The deputy is the public representative of the office. The very nature of the authority vested in the position requires the making of decisions and the exercising of judgment that amounts to the making of policy.

A recent Seventh Circuit case, Kolman v. Sheahan, 31 F.2d 429, 431-34 (7th Cir. 1994), which denied a motion to dismiss a political firing claim, is distinguishable, In that case, the court stressed that the record was silent regarding the nature of the positions at issue. The positions were within an obscure department in county government and could well have been

inconsequential or meaningless with respect to policymaking. The court simply had no idea. See id. at 432. In this case, the inherent powers of the depouty attorney general are found in the statutes. The deputy attorney general has the same power and authority as the attorney general.

The Court finds that the position described by statute as deputy attorney general carries with it inherently the responsibility to have meaningful input into governmental decisionmaking on issues where there is room for principled disagreement on goals or their implementation. The statutory conferral to the attorney general of the right to remove deputies at any time, see I.C. § 4-6-5-1, reflects this expectation, as does the fact that deputies' terms expire at the same time as the appointing attorney general's term, see Hord v. State, 79 N.E. 916, 921-22 (Ind. 1907); see also Roberts v. State ex rel. Jackson Co. Bd. of Com'rs, 278 N.E.2d 285, 290 (Ind. Ct. App. 1972), as does the fact that deputies are exempt from the state's civil service laws. See I.C. § 4-15-2-3.8.

For all the above reasons, the Court concludes that the position of deputy attorney general is exempt from the constitutional prohibition of politically motivated firing. Absent that prohibition, Americanos could be fired for his political affiliation. See Selch, 5 F.3d at 1047. Count 1 is DISMISSED WITH PREJUDICE.

Count's [sic] 2 and 3 fail for the same reasons. See Heck v. City of Freeport, 985 F.2d 305, 310 (7th Cir. 1993). Both the ADEA and Title VII contain the following exemption:

> [T]he term "employee" shall not include any person selected to public office in any State or political subdivision of any State by the qalified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate advisor with rspect to the exercise of the constitutional or legal powers of the office. The exemption set forth i the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or politicla subdivision.

29 U.S.C. § 630(f); 42 U.S.C. § 2000e(f). The position of deputy attorney general falls within the exemption. Each attorney who serves on the attorney general's staff as her deputy, by the inherent nature of the position, is an employee on the policymaking level and an immediate advisor to the attorney general with respect to the constitutional or legal powers of the office. Again, the fact that a particular deputy attorney general may not be asked to provide the kind of advice or service that another might by [sic] asked to provide is not controlling. The nature of the position, not the actual performance in that position, is what controls.

Plaintiff cites Rabouin v. Colorado Department of Law, 754 F.Supp. 171, 173-74 (D. Colo. 1990), in which a motion to dismiss the Title VII claim of a Colorado assistant attorney general was denied. The court was concerned that the plaintiff was the most junior attorney in the office and had no policymaking authority. The court, however, did not look to any statutes defining the powers or duties of the attorney general or assistants.

Defendants counter Rabouin with more persuasive authorities, including Monce v. City of San Diego, 895 F.2d 560 (9th Cir. 1990). In Monce, the city successfully moved to dismiss

an age discrimination claim filed by a deputy city attorney. The plaintiff was a trial deputy, one of the lowest positions in the office, with little individual authority. Looking to stattes like those applicable here, the Ninth Circuit concluded that the position was subject to the personal staff exemption. The Court reasoned:

> Although Monce did not have an immediate personal relationship with the City Attorney and was not personally entrusted with a great deal of responsibility, as a deputy city attorney he was placed in the public eye as a representative of the City Attorney's Office and was empowered to exercise the legal authority of that office.

Id. at 561.

For all the above reasons, the Court concludes that Americanos has fialed to state a claim under either the ADEA or Title VII. Counts 2 and 3 are DISMISSED WITH PREJUDICE.

IT IS SO ORDERED this 13 day of December, 1994.

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

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